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No. 99-2035

IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF ERWIN CHEMERINSKY AND ARTHUR F. MCEVOY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici curiae are law professors with expertise in the fields of federal jurisdiction, constitutional law and legal history, both of whom appeared as *amici* in the last major case in which this Court grappled with the proper scope of federal appellate review of jury damage awards, *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). Our qualifications are summarized in the Appendix.[1]

We have no interest in the outcome of the particular lawsuit at bar. We file this brief solely to alert the Court to the need to grant certiorari in this case to resolve the first question presented in the petition, which addresses the fundamental conflict and confusion among the federal circuit courts of appeals regarding the proper scope of appellate review for jury-awarded punitive damages.

SUMMARY OF ARGUMENT

Petitioner asks this Court to grant review in this case, first and foremost, to resolve a conflict that exists among the federal circuit courts of appeals regarding the nature of federal appellate review of punitive damage awards issued by juries. *See* Petition for Certiorari ("Pet.") at 8-13. Although we differ somewhat with petitioner on how the circuit conflict is most appropriately described, the circuit conflict is real and substantial. The fundamental matter dividing the circuits is whether to apply in the punitive damages context the standard of appellate review that has traditionally been used in all other contexts — in both criminal litigation and civil litigation alike — when one party argues that the result reached by the jury is not sustainable on the particular record of the case.

Several circuits, when reviewing attacks on punitive damage awards for "gross excessiveness," engage in a *de novo* review of

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of this brief.

whether the amount awarded by the jury is rational on the particular record. This review standard gives no particular deference to the district court's analysis of whether the award is constitutionally excessive, a matter that is treated as a classic "legal" issue, determined with the record evidence viewed in the light most favorable to the jury's verdict. This approach comports with the test adopted by this Court for appellate court review of criminal liability, *see, e.g.*, *Jackson v. Virginia*, 443 U.S. 307, 317-20, 324 (1979), and its close analogs used in appellate review of civil liability and of the severity of criminal and civil penalties. *Jackson*'s "rational factfinder" approach is appropriate for appellate review of jury-awarded punitive damages, as this Court strongly implied in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994).

Other circuits, in articulating a standard of review for punitive damage awards, have departed from this traditional "rational factfinder" approach. Rather than examining the record *de novo* to determine whether the result reached by the jury was rational, the Eleventh Circuit uses a standard of review that defers to so-called "factual" findings made by district courts concerning the level of reprehensibility of the defendant's conduct and other key factors bearing on the ultimate legal issue of gross excessiveness. This approach creates twin risks. One is the risk of undue interference with rational jury verdicts (as district courts enjoy leeway to throw out verdicts that would be found rational on *de novo* review). The other is the risk of approval of irrational jury verdicts (as district courts enjoy leeway to uphold verdicts that would be found irrational on *de novo* review).

The Third Circuit has gone the opposite way in its departure from the traditional standard of *de novo* review of a jury verdict's rationality. The Third Circuit reads this Court's precedents as requiring appellate judges to engage in "intensive review" of punitive damage awards, and to use their own experience and judgment to ensure that only appropriate awards are upheld. This expansive review standard violates statutory

and constitutional strictures on the scope of federal appellate review of jury verdicts.

The approach followed by the Ninth Circuit is difficult to discern with precision. But regardless of how this Court reads Ninth Circuit law, this Court should grant review in this case to resolve the conflict among the federal circuit courts of appeals concerning the proper standard for reviewing federal substantive due process attacks on jury-awarded punitive damages. The proper standard of appellate review is an important and frequently recurring matter that should be addressed and resolved at the earliest available opportunity.

ARGUMENT

CERTIORARI IS WARRANTED IN LIGHT OF THE CONFLICT AND CONFUSION AMONG THE FEDERAL CIRCUIT COURTS OF APPEALS CONCERNING THE REVIEW OF JURY-AWARDED PUNITIVE DAMAGES

The Eleventh Circuit recently suggested that the issue of the proper appellate standard of review for federal substantive due process attacks on jury-awarded punitive damages is an "issue of first impression" nationally. *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1334 (11th Cir.), *cert. denied*, 120 S. Ct. 329 (1999). We disagree. Although the precise standard used by each circuit is difficult to define with precision, and although some circuits have not specifically addressed this issue, it is plain that an important circuit conflict exists as to the standard of review.

The three different approaches are these: (a) under the approach of several circuits, *de novo* review of what is termed a "legal" issue under a "rational factfinder" standard, which we believe is the correct approach; (b) under the Eleventh Circuit's approach, a nominally *de novo* review framework, coupled with deferential review of district court "factual" findings; and (c) under the Third Circuit's approach, an "intensive review" of the punitive damage award, conducted with the benefit of the

appellate judges' own experience and judgment concerning what size award is reasonable. We describe each approach and briefly summarize why we believe the first approach is the correct one, and why certiorari is warranted in this case to resolve the issue.

A. Several Circuits Engage in *De Novo* Review of Whether the Jury's Award is Rationally-Supportable on the Record, Consistent With the Traditional Standard of Review for Both Criminal and Civil Jury Verdicts

At least four federal circuit courts of appeals — the Second, Seventh, Eighth and Tenth Circuits — appear to engage in *de novo* review of whether the amount of punitive damages awarded in a particular case is rationally supported by the record evidence, using a standard akin to the "rational factfinder" standard articulated in *Jackson v. Virginia*, 443 U.S. 307, 317-20, 324 (1979), and related cases. Typically, this *de novo* review is conducted under an "abuse of discretion" rubric. Review for "abuse of discretion" is nominally involved because this is the label traditionally attached to review of a district court's ruling on a new trial motion (the device used to challenge the size of a jury's damage award). But there is no discretion actually accorded the district court. Rather, in these circuits, excessiveness is treated as a "legal" question, decided on the record with all legitimate factual inferences drawn in favor of the jury's result, and a district court perforce abuses its discretion in upholding a verdict that lacks rational support in the record.

More than a decade ago the Seventh Circuit, in *Strauss v. Stratojac Corp.*, 810 F.2d 679 (7th Cir. 1987), reiterated settled precedent that it would find a punitive damage award excessive on appeal only if there is "'no rational connection between the evidence on the damages and the verdict,'" and in that case it upheld the punitive award on the finding that it did "not seem irrational." *Id.* at 686.

Likewise, the Eighth Circuit, in *Jacobs Mfg. Co. v. Sam Brown Co.*, 19 F.3d 1259 (8th Cir.), *cert. denied*, 513 U.S. 989 (1994), indicated that a punitive damage award should not be

disturbed based on a gross excessiveness analysis unless the amount awarded "was so unrealistic that it showed irrational rather than reasonable jury behavior." *Id.* at 1266 (citation omitted). The Eighth Circuit reinstated in full the jury's $2.7 million punitive damage award that the district court had found excessive, based on the Eighth Circuit's own conclusion, after a review of the record, that there was no indication that the award "could only have resulted from irrational jury behavior." *Id.* The court applied *de novo* review of the jury's underlying award, under a "rational factfinder" standard, and there was no deference to the district court's analysis of the amount of the award. Recently, the Eighth Circuit explicitly held that in reviewing federal substantive due process challenges to punitive damage awards, it will "review the district court's conclusions de novo." *United States v. Big D Enterprises, Inc.*, 184 F.3d 924, 932-33 (8th Cir. 1999), *cert. denied*, 120 S. Ct. 1419 (2000).[2]

Likewise, in *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996), the Second Circuit explained that in reviewing a punitive damage award "for abuse of discretion," it decides a "question of law" concerning the "upper limit" supported by the record, to determine whether the amount of the award is "rational." *Id.* at 808-09 (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 435 (1996), and *Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992)). It applied this standard to a prison beating case and held that the maximum punitive damage award supported by the record was $75,000 (as opposed to the $200,000 awarded by the jury and upheld by the district court). In doing so, the Second Circuit decided the federal substantive due process attack on the

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[2] A case cited in *Big D* to illustrate the nature of the *de novo* review being used, *see* 184 F.3d at 933, confirms the limited nature of this review. In that case, *Midland Banana & Tomato Co., Inc. v. United States Dep't of Agric.*, 104 F.3d 139, 142 (8th Cir.), *cert. denied*, 522 U.S. 951 (1997), the Eighth Circuit relied on the rule that "[w]e review federal constitutional questions de novo." *But see Thorne v. Welk Inv.*, 197 F.3d 1205, 1211-12 (8th Cir. 1999) (reviewing punitive damage award upheld by district court "for an abuse of discretion" and finding "no abuse of discretion with regard to the remitted amount of punitive damages").

verdict based on a *de novo* review of the inferences supported by the record, without any deference to the district court's view of the record. *Id.* at 809-13.

Finally, it appears that the Tenth Circuit also applies a *de novo* standard of review, under which no deference is owed to the district court and the sole issue is whether, drawing all legitimate factual inferences in favor of the jury's verdict, the amount of the punitive damage award is irrationally excessive. In *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 642-43 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997), the court stated that whether a given award violates federal substantive due process is "a federal constitutional issue" that is "one of constitutional fact that the appellate courts have the power to decide" based on their "review of the record." *See also Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235 (10th Cir. 2000); *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1228-31 (10th Cir. 2000); *FDIC v. Hamilton*, 122 F.3d 854, 857, 861-62 (10th Cir. 1997).

The *de novo* review under a "rational factfinder" standard employed by these four circuits is, we submit, the correct approach. "It is a commonplace that a jury verdict must be reviewed in relation to the record before it." *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 469 (1993) (Kennedy, J., concurring) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). Federal appellate review of jury-awarded damages to ensure that a particular award is rational on the record of the case is hardly a novel development. For example, even during the 1960s, when the existence of any federal appellate authority to review excessiveness claims was a matter of considerable dispute, *see, e.g., Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 446-48 & n.3 (8th Cir.) (Blackmun, J.), *cert. denied*, 369 U.S. 929 (1961), the Fifth Circuit emphasized that the function of appellate review in this context was to decide whether the district court had abused its discretion in upholding a verdict that was without rational support on the record. In *Glazer v. Glazer*, 374 F.2d 390 (5th Cir.) (Wisdom, J.), *cert. denied*, 389 U.S. 831 (1967), the court struck down a $1.9 million compensatory award

for breach of contract. In doing so, it stated that the district court had abused its discretion because "[t]he verdict was excessive *as a matter of law* in that it exceeds any *rational* appraisal or estimate of the damages that could be based upon the evidence before the jury." *Id.* at 413 (emphasis added).[3]

This "rational factfinder" standard for reviewing the underlying jury verdict for rationality, with the record viewed in the light most favorable to the verdict and with no particular deference to the trial judge, is of course a familiar one. In criminal litigation it has long been settled that where a defendant challenges the adequacy of the evidence introduced at trial, the proper test on appellate review (and on habeas review of state court proceedings) is whether "a rational factfinder" could have arrived at the jury's result under the governing law and facts. *Jackson v. Virginia*, 443 U.S. 307, 317-20, 324 (1979). *Jackson*'s "rational factfinder" test is an objective one that focuses on the corpus of evidence that was before the jury. It "does not permit a court to make its own subjective determination of guilt or innocence," nor does it concern "how rationally the verdict was actually reached" based on "scrutiny of the reasoning process actually used by the factfinder — if known." *Id.* at 319-20 n.13. "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts," thus

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[3] A linkage between the "abuse of discretion" *label* for review of an order on a motion for a new trial, and the "rational factfinder" *substance* of the review of a compensatory damages award, has persisted to this day. *See, e.g., Mejias-Quiros v. Maxxam Prop. Corp.*, 108 F.3d 425, 427-29 (1st Cir. 1997) (stating that under *Gasperini*'s abuse-of-discretion review standard, a district court's denial of a new trial on damages will be overturned "only if the damages awarded lack 'a rational basis in evidence,'" and concluding that the $25,000 award for medical expenses "lacked any rational basis" in the record) (citation omitted); *Air Safety, Inc. v. Roman Catholic Archbishop*, 94 F.3d 1, 4 (1st Cir. 1996) (stating that the proper scope of review "is narrow" and that "an abuse of discretion" cannot be found where "the jury award has a rational basis in evidence") (citation omitted).

"imping[ing] upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Id.* at 319. The question it poses to a reviewing court is simple. "Under *Jackson*, the question whether the trier of fact has power to make a finding of guilt requires a binary response: Either the trier of fact has power as a matter of law or it does not." *Schlup v. Delo*, 513 U.S. 298, 330 (1995).[4]

Jackson involved the review of evidentiary sufficiency to sustain a criminal conviction. But a close variant of the *Jackson* standard has traditionally applied to appellate review of liability determinations in civil litigation as well. This Court articulated

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[4] The "rational factfinder" test plainly does not involve any sort of weight-of-the-evidence review of the jury's verdict. In *Tibbs v. Florida*, 457 U.S. 31 (1982), the Court stated that the *Jackson* test "forbids any conviction based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt," so that "[t]he Due Process Clause . . . sets a lower limit on an appellate court's definition of evidentiary sufficiency," but it emphasized that "the reviewing court must view 'the evidence in the light most favorable to the prosecution.'" *Id.* at 45 & n.21 (quoting *Jackson*, 443 U.S. at 319). *See also Herrera v. Collins*, 506 U.S. 390, 402 (1993) (review under *Jackson* "does not focus on whether the trier of fact made the *correct*" decision, "but rather whether it made a *rational* decision"); *Burks v. United States*, 437 U.S. 1, 16 (1978) ("Even the trial court, which has heard the testimony of witnesses firsthand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal").

According litigants the right to appellate weight-of-the-evidence would impose on appellate courts in every case the burden "to examine in some detail all of the evidence," rather than simply to confirm that the jury's result is supported by "adequate evidence in the record." *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1199 (2d Cir. 1995). This would duplicate work already competently done by trial judges and inevitably undermine confidence in trial judges. *See* Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 781-82 (1957). And by encouraging disappointed litigants to appeal in an effort to re-try the facts, it would lead to greater docket congestion and less time for attention to serious issues of law. *See* Charles Alan Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 Tex. L. Rev. 949, 967-68 (1964); *see also* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure: Civil 2d* § 2819, at 204 (2d ed. 1995).

the general approach decades ago as follows:

> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict.

Brady v. Southern Ry., 320 U.S. 476, 479-80 (1943). This Court explicitly introduced *Jackson*'s "rational factfinder" language into the summary judgment context in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), in stating that, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial,'" and in emphasizing that the inferences that may be drawn from the facts must be "'viewed in the light most favorable to'" the nonmovant. *Id.* at 587 (citations omitted). In civil litigation, the federal appellate courts now routinely refer to the "rationality" of a finding of liability when they engage in *de novo* review of the corpus of record evidence in reviewing summary judgment and JMOL rulings.[5]

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[5] *See* David G. Knibb, *Federal Court of Appeals Manual* § 30.2, at 526 (4th ed. 2000). An electronic search of decisions in the past decade reveals that at least ten of the twelve federal circuit courts of appeals employ the "rational factfinder" test in their *de novo* review of summary judgment and/or JMOL rulings. *See, e.g., Doby v. Decrescenzo*, 171 F.3d 858, 873-74 (3d Cir. 1999); *This is Me, Inc. v. Taylor*, 157 F.3d 139, 142 (2d Cir. 1998); *Tuohey v. Chicago Park Dist.*, 148 F.3d 735, 740 (7th Cir. 1998); *Davis v. United States Postal Serv.*, 142 F.3d 1334, 1341 (10th Cir. 1998); *Buntin v. Breathitt County Bd. of Educ.*, 134 F.3d 796, 800 (6th Cir. 1998); *Gremmels v. Tandy Corp.*, 120 F.3d 103, 105 (8th Cir. 1997); *Gambetta v. Prison Rehabilitative Indus. & Diversified Enters., Inc.*, 112 F.3d 1119, 1121 (11th Cir. 1997); *Pierce v. Atchison T. & S.F. Ry.*, 110 F.3d 431, 438 (7th Cir. 1997); *Goldhirsh Group, Inc. v. Alpert*, 107 F.3d 105, 107-08 (2d Cir. 1997); *Waymire v. Harris County*, 86 F.3d 424, 428 (5th Cir. 1996); *United States v. 121 Allen Place*, 75 F.3d 118, 120-21 (2d Cir. 1996); *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 187 (5th Cir. 1995); *Gulf South*

The "rational factfinder" standard also appears at the penalty stage in criminal proceedings. For example, in the capital punishment context, in deciding whether the record supports a finding of a particular death-qualifying "aggravating circumstance," the "appropriate standard of review is the 'rational factfinder' standard established in *Jackson*." *Lewis v. Jeffers*, 497 U.S. 764, 781 (1990). *See also id.* at 781-84; *Sawyer v. Whitley*, 505 U.S. 333, 339-41, 345-47 & n.14 (1992) (citing *Jackson* in reference to the "innocent of death" doctrine in the context of successive habeas claims).

In a related vein, in reviewing whether particular criminal sentences are in violation of the Eighth Amendment's ban on "cruel and unusual punishments," this Court treats the issue as "legal" in nature, reviewable *de novo*, with no particular deference to the trial court's view of the matter. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 961, 985-90, 994-96 (1991) (opinion of Scalia, J., joined by Rehnquist, C.J.); *id.* at 996, 1001-08 (opinion of Kennedy, J., joined by O'Connor and Souter, JJ.); *Solem v. Helm*, 463 U.S. 277, 283, 290-300, 303 (1983); *Rummel v. Estelle*, 445 U.S. 263, 275-82 (1980); *Gore v. United States*, 357 U.S. 386, 393 (1958); *Weems v. United States*, 217 U.S. 349, 362-68, 377, 380-82 (1910).[6] The Court has

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Medical & Surgical Inst. v. Aetna Life Ins. Co., 39 F.3d 520, 521 (5th Cir. 1994), *cert. denied*, 516 U.S. 814 (1995); *Favorito v. Pannell*, 27 F.3d 716, 719 (1st Cir. 1994); *Alvarez-Crespo v. Olavarria-Rivera*, 994 F.2d 35, 36 (1st Cir. 1993); *Smith v. American Nat'l Red Cross*, 1992 WL 357850, at *2 (4th Cir. 1992); *In re Wade*, 969 F.2d 241, 248 (7th Cir. 1992); *Premier Bank v. Mosbacher*, 959 F.2d 562, 566 (5th Cir. 1992); *Pitts v. Michael Miller Car Rental*, 942 F.2d 1067, 1069-70 (6th Cir. 1991); *T. Harris Young & Assocs., Inc. v. Marquette Electronics, Inc.*, 931 F.2d 816, 821, 828 (11th Cir.), *cert. denied*, 502 U.S. 1013 (1991); *Kraus v. Sobel Corrugated Containers, Inc.*, 915 F.2d 227, 229 (6th Cir. 1990); *In re Merritt Logan, Inc.*, 901 F.2d 349, 366 (3d Cir. 1990); *Taylor v. List*, 880 F.2d 1040, 1044-45 (9th Cir. 1989).

[6] The federal circuit courts of appeals have understood that the review of Eighth Amendment challenges is to be conducted *de novo*. *See, e.g., United States v. Flowal*, 163 F.3d 956, 963 (6th Cir. 1998), *cert. denied*, 526 U.S. 1093 (1999); *Windham v. Merkle*, 163 F.3d 1092, 1106 (9th Cir. 1998);

adopted a similar review standard with respect to criminal forfeitures. *United States v. Bajakajian*, 524 U.S. 321, 336-37 & n.10 (1998).

In reviewing whether particular instances of civil fines are constitutionally excessive, this Court has likewise treated the issue as "legal" in nature and reviewable *de novo*, with no particular deference to the views of lower courts or administrative agencies concerning the ultimate constitutional issue of excessiveness. *See, e.g., St. Louis, I. Mt. & So. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915); *Missouri Pacific Ry. Co. v. Tucker*, 230 U.S. 340, 347, 349-51 (1913); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111-12 (1909).

Finally, the "rational factfinder" standard that is employed by most of the federal circuit courts of appeals that have articulated a review standard likewise finds solid support in this Court's decisions during the past decade addressing federal substantive due process challenges to punitive damage awards. In all three cases, the Court treated the "gross excessiveness" issue as a "legal" one, reviewable *de novo* with the record read in the light most favorable to the jury's verdict, with no particular deference to the views of the district court. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-86 (1996); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458-62 (1993) (plurality opinion); *Pacific Mutual Life Ins. Co. v. Haslip*, 400 U.S. 1, 12, 18-24 (1991). Further, in a decision holding that some degree of judicial review of the size of punitive damage awards is required by the Due Process Clause of the Fourteenth Amendment, this Court strongly implied that *Jackson*'s "rational factfinder" approach is the appropriate review standard for "gross excessiveness" claims. *Honda Motor Co. v. Oberg*, 512 U.S.

United States v. DeLuca, 137 F.3d 24, 40 n.19 (1st Cir.), *cert. denied*, 525 U.S. 874 (1998); *Leslie v. Doyle*, 125 F.3d 1132, 1134 (7th Cir. 1997); *United States v. Quinn*, 123 F.3d 1415, 1425 (11th Cir. 1997), *cert. denied*, 523 U.S. 1012 (1998); *United States v. Angulo-Lopez*, 7 F.3d 1506, 1509-10 (10th Cir. 1993), *cert. denied*, 511 U.S. 1041 (1994).

415, 432 & n.10 (1994) (citing *Jackson*, 443 U.S. at 324). *See also* Tr. of Oral Argument in *Honda Motor Co. v. Oberg*, No. 93-644 (Apr. 20, 1994), 1994 U.S. Trans. LEXIS 150, at *13-14 (questioning by Justice O'Connor as to "why should the constitutionally mandated review be any more than is required in a criminal case" under "the *Jackson* standard," leading petitioner's counsel Andrew L. Frey to state: "I have no problem with that standard. That's what we would like to see the Court supply.").

B. The Eleventh Circuit Improperly Defers to "Factual" Findings Made by District Courts in Reviewing Jury Verdicts, Carrying With It the Twin Risks of Undue Interference With Rational Jury Verdicts, and the Approval of Irrational Jury Verdicts

By contrast to the several circuits that apply the traditional "rational factfinder" standard in assessing jury verdict, giving *de novo* consideration to whether a punitive damage award is rationally sustainable on the particular record of the case, the Eleventh Circuit has adopted a standard that requires, in part, improper deference to district court findings.

By and large, the Eleventh Circuit appears to follow the "rational factfinder" approach used by most circuits, treating the issue of whether a particular punitive damage award violates federal substantive due process as a "legal" issue subject to *de novo* review. The Eleventh Circuit disclaims any "abuse of discretion" label, thus making clearer than other circuits that, in general, a *de novo* review standard applies. Thus, in *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir.), *cert. denied*, 120 S. Ct. 329 (1999), the court stated that under this Court's decisions

> there is a constitutional limit on a punitive damage award beyond which neither the jury nor the court has any discretion to venture. The abuse of discretion standard is inapplicable where no discretion may be exercised.

> The ultimate question whether a punitive damage award is constitutionally excessive is, of course, a legal issue. We review questions of law *de novo*.

Id. at 1334.

Up to this point, the Eleventh Circuit's *Johansen* decision is straightforward, with the court endorsing *de novo* review of a jury verdict awarding punitive damages, conducted through a review of the underlying record viewed in the light most favorable to the verdict, without deference to the district court. But the court then adds a caveat that creates a curious hybrid standard of review: rather than deferring on factual matters to *the factfinder* on the case, that is, the jury, the Eleventh Circuit defers to the posttrial analysis of *the district court* that reviewed the jury's verdict, "accept[ing] the district court's findings of fact unless they are clearly erroneous" within the meaning of Fed. R. Civ. P. 52(a). *Id.*

We are aware of no authority for such a standard of review. The only case cited by the Eleventh Circuit on this point is this Court's decision in *United States v. Bajakajian*, 524 U.S. 321 (1998), in which the Court conducted an excessiveness analysis of a criminal forfeiture imposed by a district court after a bench trial and confirmed the basic rule that although excessiveness determinations are "legal" issues reviewed *de novo*, the evidence must be viewed in the light most favorable to the result reached by the factfinder — there, the district court that conducted the bench trial and issued Rule 52(a) factual findings. *Id.* at 336-37 & n.10. We are at a loss to understand how *Bajakajian* could be construed to support the proposition that if a district court issues an opinion on a posttrial motion finding that a jury's award of punitive damages violates federal substantive due process, on appeal there will no longer be "rational factfinder" review of whether the record before the jury supports the ultimate verdict, but instead the district court's opinion will be given the status of Rule 52(a) findings — thereby rendering irrelevant the fact that it is a jury verdict, not a bench trial finding, undergoing review. *Cf. Sawyer v. Whitley*, 505 U.S. 333, 346 n.14 (1992) (rejecting

proposed borrowing of Rule 52(a) standard in another context involving review of jury verdicts).

Apart from the conceptual inappropriateness of the Eleventh Circuit's mixing of two separate appellate review standards — that used to assess the rationality of a jury's verdict, and that used to assess the validity of explicit factual findings made at the conclusion of a bench trial — this approach creates twin risks of aberrant results. Under the "rational factfinder" review standard used by most circuits, either the jury's punitive damage award is rational, in which case it is upheld, or it is not rational, in which case it is struck down. *Cf. Schlup v. Delo*, 513 U.S. 298, 330 (1995) (stating that under the *Jackson* test, the question of whether the jury's verdict could have been reached by a rational factfinder "requires a binary response"). Under this approach, there is no risk of undue interference with jury verdicts (as *only* irrational jury verdicts are struck down) and no risk of the approval of irrational jury verdicts (as *all* irrational jury verdicts are struck down).[7]

The Eleventh Circuit's approach creates a risk of approval of irrational jury verdicts: even where the appellate court on *de*

[7] We hasten to add that this *de novo* standard of review, which ensures that all irrational verdicts are struck down on federal substantive due process grounds, but that no rational verdicts are struck down on such grounds, is relevant in only a tiny percentage of cases, and that this standard does not place trial judges in a legal straightjacket. The vast bulk of jury verdicts raise no colorable excessiveness concern. Further, as a practical matter, most verdicts that are constitutionally problematic are reduced by trial judges in the exercise of an entirely different source of power to control aberrant verdicts. Throughout our nation's history, federal trial judges have enjoyed broad authority to grant new trials, both as to liability and damages, through the exercise of their power to sit as the "thirteenth juror," weighing the evidence to decide whether a new trial is in the interests of justice. As we and others have argued at length elsewhere, this power of the trial judge to alter jury verdicts based on a weight-of-the-evidence analysis is exclusive to trial judges and is effectively immune from control by appellate courts. *See* Brief of Federal Jurisdiction and Legal History Scholars Akhil Reed Amar, et al., as *Amici Curiae* in Support of Petitioner, in *Gasperini v. Center for Humanities*, No. 95-719 (filed March 1, 1996) (hereinafter "*Gasperini Amicus* Br.").

novo review would conclude that the result reached by the jury is irrational and hence in violation of federal substantive due process, the verdict can nonetheless be upheld on the basis of factual findings made by the district court, to which the appellate court will defer. This approach also creates the opposite risk of undue interference with rational jury verdicts: even where the appellate court on *de novo* review would conclude that the result reached by the jury is rational, the district court can make factual findings striking down the verdict, to which the appellate court will also defer. We see no basis for the hybrid review standard created by the Eleventh Circuit, and the use of the standard raises troublesome concerns of practicality and fairness that merit consideration in the context of the instant case. (The petition for certiorari in *Johansen*, which this Court denied, raised no standard-of-review issue.)

C. The Third Circuit Improperly Employs "Intensive Review," in Violation of Both Statutory and Seventh Amendment Strictures on the Scope of Federal Appellate Review of Jury Verdicts

The appellate review standard applied by the Third Circuit is even more aberrant and in conflict with fundamental strictures on the scope of appellate review than is the Eleventh Circuit's approach. The Third Circuit's leading case is *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 791 (2000). Unlike most circuits, which defer to juries under the "rational factfinder" standard, and unlike the Eleventh Circuit, which also defers to district courts on factual aspects of posttrial rulings that are not clearly erroneous, the Third Circuit exhibits little if any deference to either the jury or the district court in evaluating federal substantive due process attacks on jury-awarded punitive damages.

As the Third Circuit announced in *Inter Medical Supplies*, it has taken on what it terms a "challenging" role: "The role of gatekeeper" over sizable punitive damage awards. *Id.* at 450. In

its view, this "is not an enviable task," and it has "searched vainly in the case law for a formula" with which to pass on such attacks but has "not found one." *Id.* at 468. Making no reference to the traditional "rational factfinder" standard of review, the Third Circuit appears to engage in some version of weight-of-the-evidence review (see note 4, *supra*) whose results vary depending on the composition of the panel that hears a case. In deciding the upper limit of punitive damages in a case, each Third Circuit panel "must rely on its combined experience and judgment" and, when its members disagree, "they must seek an accommodation among their views" concerning what is "the proper, reasonable punitive damages award." *Id.* Such "intensive review" of punitive damage awards, the Third Circuit believes, is required by this Court's jurisprudence. *Id.* at 470. Using this "intensive review" standard, two members of the *Inter Medical Supplies* panel reduced a punitive damage award in an intentional tort case by 98%, from $50 million to $1 million, a tiny fraction of the $48 million in compensatory damages upheld by the Third Circuit. *Id.* at 460-61, 463, 467-69. The dissenting judge, arguing that the majority's reduction had "no principled basis," and that the majority was using an inappropriate review standard, would have upheld the $50 million punitive award. *Id.* at 471-72 (Garth, J., dissenting).

The Third Circuit's review standard violates fundamental strictures on the scope of federal appellate review of jury verdicts. Instead of limiting itself to a review of whether the jury's damage award is rational on the record of the case, the Third Circuit appears to engage in weight-of-the-evidence review of the *factual* issue of what is the "proper" or "reasonable" amount of punitive damages in a particular case. As we and others explained in an *amicus* brief filed in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), this form of federal appellate review is entirely improper. *See Gasperini Amicus* Br., *supra* note 7. Appellate weight-of-the-evidence or *de novo* review of factual issues has been barred by statute since the enactment of the Judiciary Act of 1789, § 22, 1 Stat. 84-85, to the present day, *id.* at 22-24, a statutory structure which is both

compatible with basic fairness to litigants and which promotes efficiency. *Id.* at 24-30. Even more fundamentally, this sort of "intensive review" practiced by the Third Circuit has been barred by the Re-Examination Clause of the Seventh Amendment since the enactment of the Bill of Rights in 1791. *Id.* at 4-21. As we have argued previously:

> This Court has repeatedly held that the question of the adequacy of the evidence to support a damage award is "purely a question of fact," not a legal issue. Weight-of-the-evidence review simply gives an appellate court the opportunity to substitute *its* view of the evidence for that of the jury, not to correct any kind of defect in the proceeding. By definition, the award is one that a rational jury could reasonably have imposed; its only "flaw" is that a federal appellate court disagrees with it.

Id. at 19 (quoting *Metropolitan R.R. v. Moore*, 121 U.S. 558, 574 (1887), and citing *St. Louis, Iron Mountain & S. Ry. v. Craft*, 237 U.S. 648, 661 (1915)).

In *Gasperini*, the Members of this Court disagreed over whether the constraints of a New York tort-reform statute governing damages could reasonably be construed as imposing a substantive legal limit on damages (that is, although not a preset cap, what amounted to a "soft cap" dependent in part on the facts of the case) that could be applied by the district court, followed by appellate review for "legal" error under an abuse-of-discretion standard. But as we read the *Gasperini* opinions, no Member of the Court disputed that the Seventh Amendment bars a federal appellate court from engaging in weight-of-the-evidence review. The dispute in *Gasperini* was simply over whether the New York statute should be viewed by federal district courts as imposing a "soft cap," with federal appellate courts properly policing the outer boundaries of district court rulings applying this cap, or whether instead such a framework for review would invariably draw federal appellate courts into the prohibited enterprise of engaging in weight-of-the-evidence second guessing

of jury verdicts. *See Gasperini*, 518 U.S. at 434-38 (opinion of the Court) (viewing New York statute as imposing substantive cap, applicable in district court and therefore reviewable on appeal); *id* at 442-47 (Stevens, J., dissenting) (viewing New York statute as prescribing "an objective, legal limitation on damages" with the district court's analysis and therefore reviewable on appeal as a matter of law); *id.* at 448-50, 460-469 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (viewing any appellate application of the New York statute as requiring weight-of-the-evidence review that is prohibited by the Seventh Amendment).

Under *Gasperini*, we submit, the invalidity under the Seventh Amendment of the "intensive review" standard used by the Third Circuit is clear. By contrast, it would appear (especially in light of *Gasperini*) that the "rational factfinder" standard of review for punitive damages followed by most circuits is compatible with the Seventh Amendment. Thus, in our *amicus* brief in *Gasperini* we confined our argument to a demonstration of the impermissibility of any weight-of-the-evidence review in civil cases by federal appellate courts, raising no question as to "whether federal appellate courts have the power to review the arguably legal question of a damage award's compliance with the substantive due process 'reasonableness' standard." *Gasperini Amicus* Br. at 20 & n.19 (citing *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994), and *Southern Ry. v. Bennett*, 233 U.S. 80, 87 (1914) (Holmes, J.)).

D. Although the Approach of the Ninth Circuit is Not Entirely Clear, This Case is an Appropriate Vehicle for Review of the Circuit Court Conflict

The approach followed by the Ninth Circuit at present seems unclear. *See* Pet. at 9-10 & n.8; Pet. App. at 3a-4a. In the briefing below, the attack of petitioner Cooper Industries, Inc., on the award of punitive damages was premised on the argument that a *de novo* review standard applied. Opening Brief of Appellant filed August 3, 1998, at 2-3, 59-63. Respondent

Leatherman Tool Group, Inc., took the position that an abuse-of-discretion standard applied, and argued that the district court had not abused its discretion in upholding the jury's award of $4.5 million in punitive damages. Brief of Appellee Leatherman Tool Group, Inc., filed Sept. 1, 1998, at 3, 5, 57-65. The Ninth Circuit applied an abuse-of-discretion review standard, specifically holding that "the district court did not abuse its discretion in declining to reduce the amount of punitive damages." Pet. App. at 4a. The analysis set forth by the Ninth Circuit in support of this holding, especially in light of its cursory nature, suggests that its standard of review is akin to the deferential standard used by the Eleventh Circuit. There is little if any indication that the Ninth Circuit panel in this case approached the excessiveness issue as do the Second, Seventh, Eighth and Tenth Circuits: by conducting a *de novo* review of the record to determine whether a rational factfinder could have reached the result that was reached by the jury, based on the evidence and instructions that it was given.

Rather, it appears that the Ninth Circuit simply deferred to the result reached by the district court, under a standard that gives district courts even more discretion to rule as they please than that set out by the Eleventh Circuit in *Johansen* (which at least made clear that a district court's ruling on the ultimate issue of gross excessiveness involves a legal determination, subject to *de novo* review). For example, the only two sentences of the Ninth Circuit's decision that squarely address the size of the punitive damage award focus on the "findings" of the district court "that the punitive damage award was proportional and fair, given the nature of the conduct, the evidence of intentional passing off, and the size of an award necessary to create deterrence to an entity of Cooper's size and assets," findings that the Ninth Circuit held "were supported by the evidence, such that the award did not violate Cooper's due process rights." Pet App. at 3a.

We do not claim that the matter is free from doubt, and it seems at least conceivable that in spite of this language in the decision below, the Ninth Circuit in fact has a practice, though

one not clearly articulated, of conducting "rational factfinder" review of punitive damage awards, albeit under the rubric of an "abuse of discretion" label. After all, other circuits use an "abuse of discretion" label while in substance reviewing under a "rational factfinder" standard. But regardless of the proper reading of the decision below, it seems clear that there currently exists an important conflict among the federal circuit courts of appeals over what, precisely, an appellate judge is to decide in passing upon a claim that a jury-rendered punitive damage award is grossly excessive. In some circuits, appellate judges ask whether a rational factfinder could have rendered the award on the record and instructions given the jury. In the Eleventh Circuit, appellate judges ask this question but also defer to any factual "findings" made by the district judge on the post-trial motions, treating them like Rule 52(a) findings made at the conclusion of a bench trial. In the Third Circuit, appellate judges give little if any deference to the jury or the trial judge, and instead engage in "intensive review" of punitive damage awards. Whatever is the correct approach, and whatever approach the Ninth Circuit uses, this Court should grant certiorari to ensure that a consistent approach is used nationwide.

CONCLUSION

This Court should grant the petition for certiorari to resolve the important conflict in the circuits over the proper standard of review for federal substantive due process attacks on jury-awarded punitive damages.

Respectfully submitted.

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APPENDIX

QUALIFICATIONS OF *AMICI CURIAE*

Erwin Chemerinsky is the Legion Lex Professor of Law at the University of Southern California Law Center, where he teaches federal courts, civil procedure, and constitutional law. His publications include *Constitutional Law: Principles and Policies* (Little, Brown & Co., 1997); *Federal Jurisdiction* (Little, Brown & Co., 2d ed. 1994) and *Interpreting the Constitution* (Praeger, 1987), as well as numerous articles in law reviews and other scholarly journals.

Arthur F. McEvoy III holds a joint appointment as Professor of Law and Professor of History at the University of Wisconsin, Madison, and has published extensively in the fields of American history and American legal history. He was a professor of history at Northwestern University from 1980 to 1993, and a Research Fellow at the American Bar Foundation from 1989 to 1994. He has a particular interest in the history of judicial review of jury verdicts in the United States, and was lead counsel on an *amicus* brief filed by legal historians on that issue that was cited by this Court in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 422 n.2 (1994).